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Appeal No. 93-4008

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HEARD:
November 10, 1993

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte Recreative Technologies Corp.

Request filed January 6, 1992, Control No. 90/002,613, by Duane Barton, for Reexamination of Patent No. 4,912,800, issued to Recreative Technologies Corp. on April 3, 1990, based on Serial No. 232,306, filed August 15, 1988. Cleaning Device For Golfers And Construction Method Therefor.

Timothy J. Martin for Appellant.
Duane Burton et al. for Requestor.

Primary Examiner - Chris K. Moore.

Before Pendegrass, Abrams and McQuade, Administrative Patent Judges.

Pendegrass, Administrative Patent Judge.

This is a decision on appeal from the final rejection of claims 1, 2, 4, 5, 6, 7 and 17. The patentability of claims 9 through 16 and 18 through 20 has been confirmed. Dependent claims 3 and 8 are objected to as being dependent upon a rejected claim but are otherwise allowable subject to the requirement that

they be rewritten in independent form to include the limitations of the claims from which they depend. Claims 1 through 20 in this reexamination application are unamended and are identical to the patent claims 1 through 20, respectively.

The patent under reexamination is involved in litigation styled *Recreative Technologies, Inc. vs. Preferred Response Marketing, Ltd.*, Civil Action No. 91-M-253, U.S. District Court for the District of Colorado.

The patent under reexamination is directed to a golf towel to be hung from a golf bag and the towel includes an attached brush for cleaning golf implements and accessories. An adequate understanding of the subject matter on appeal can be had from a reading of claim 1, which is reproduced as follows:

1. A cleaning device which is adapted to be secured to a golf bag for use by a golfer to clean his/her golfing implements and equipment, such as golf clubs, golf shoes, golf balls and the like, comprising:

a towel body constructed of a water absorbent material in the form of a panel having a front surface, a rear surface, a peripheral edge extending therearound and a peripheral margin adjacent the peripheral edge;

a brush member secured to said towel body on the front surface thereof, said brush member including a plurality of stiff, resilient and elongated bristles projecting generally perpendicularly outward from said front surface; and

mounting means for releasably mounting said towel while in use at a point of attachment of said golf bag, said mounting

means located in spaced apart relation from the point of attachment so that said brush member can be easily and effectively maneuvered and employed by the golfer to clean his/her golfing implements and equipment without detaching said towel body from said golf bag.

Ota	3,982,298	Sept. 28, 1976
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Although Ota does not disclose the use of his cleaning device on a golf bag for cleaning golfing implements and equipment, such use could be made of it, and the structure claimed is present in Ota. The implement 9 of Ota, while not specifically described as a towel body, could be used for such purpose, since it is disclosed as being made of a cloth consisting of either velvet or corduroy, either of which clearly qualify as the claimed "water absorbent material." The cloth 9 clearly is a panel having a front surface, and interior "rear" surface, a peripheral edge formed by the outer edges of the hollow portion 3, and the sewn joint with the central section 4. The brush consists of a flat back plate 15 carrying a plurality of elongated bristles 16 which are obviously stiff and resilient enough to stand perpendicularly from the back plate. The brush is obviously mounted to the front surface of the "towel body" 9. The strap 18 and coordinating snaps 17, 19 obviously constitute mounting means that would allow attachment to the usual handle of a golf bag.

The strap is clearly spaced apart from the brush to allow maneuvering of the brush about the point of attachment to the golf bag. Concerning claim 4, the brush is considered to be contoured at its top to facilitate gripping of the brush from the back side (outside) of the hollow portion 3, whereby through judicious placement of the user's hand, it would be possible to have the hand shielded from the area immediately about the "business end" of the brush bristles. No patentable weight is afforded to the mere appearance or design features set forth in claims 5-7, inasmuch as they add no utility.

At the outset, we note that the appellant challenges the propriety of this reexamination proceeding based solely on a patent over which the claims of the patent had been allowed in the prosecution of the original application for patent.

Once a reexamination proceeding has been ordered by the Commissioner, such order is not reviewable by this Board and may not be reviewable by the courts. Note the concurring opinion in *In re Etter*, 756 F.2d 852, 225 USPQ 1 (Fed. Cir. 1985). Also compare *Ex parte Chicago Rawhide Mfg. Co.*, 223 USPQ 351 (Bd. App. 1984)

We will not sustain the rejection of claims 1, 2, 4 through 7 and 17 under 35 USC §103. As the examiner has acknowledged in the answer, in the paragraph spanning pages 3 and 4, the claimed invention, as evidenced by the affidavits of Scott

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Bowman, Brian Gomes, Paul DiLonardo and Dan Schneider, "has achieved commercial success." Such evidence is, in our opinion, sufficient to rebut any *prima facie* case of obviousness based on the Ota patent and we refer to the case law cited on pages 16 through 19 of the appellant's brief.

However, in our opinion, the subject matter of claims 1, 2 and 4 is anticipated by the mitt type shoe cleaner of Ota. In interpreting the claimed subject matter as broadly as reasonably possible, *In re Zletz*, 893 F.2d 319, 13 USPQ2d 1320 (Fed. Cir. 1989), we find that the structure of the mitt of Ota is a cleaning device which is inherently capable of being attached to a golf bag by band 18 and male and female snaps 19 and 17. We further find that the mitt of Ota with the brush 12 is inherently capable of cleaning golfing implements and equipment. We further find that, when the band 18 of the mitt of Ota is attached to a golf bag, the brush 12 will be suspended and will inherently be capable of being used to clean golfing implements and supplies. As noted by the examiner, the mitt is formed of a material that forms a towel body and the brush member 12 is secured to the body on the front surface thereof. The

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unidentified element that permanently attaches the band 18 to the mitt is the structural equivalent of a grommet, in our opinion, and the band when attached to the snap 19 is the structural equivalent of a clasp. The brush member 12 of the Mitt of Ota has a contoured perimeter that inherently allows a user to grip the brush from the back side of the mitt.

Accordingly, we herein enter the following new ground of rejection under the provisions of 37 CFR §1.196(b).

We reject claims 1, 2 and 4 under 35 USC §102(b) as being anticipated by Ota for the reasons set forth above.

In summary:

The rejection of claims 1, 2, 4 through 7 and 17 under 35 USC §103 is reversed.

A new ground of rejection of claims 1, 2 and 4 is entered under the provisions of 37 CFR §1.196(b).


Any request for reconsideration or modification of this decision by the Board of Patent Appeals and Interferences based upon the same record must be filed within one month from the date of the decision (37 CFR 1.197). Should appellant elect to have further prosecution before the examiner in response to the new rejection under 37 CFR 1.196(b) by way of amendment or showing of


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facts, or both, not previously of record, a shortened statutory period for making such response is hereby set to expire two months from the date of this decision.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR 1.136(a). See the final rule notice, 54 F.R. 29548 (July 13, 1989), 1105 O.G. 5 (August 1, 1989).

REVERSED, 37 CFR 1.196(b).


Verlin R. Pendegrass)
Administrative Patent Judge)


Neal E. Abrams)
Administrative Patent Judge)


John P. McQuade)
Administrative Patent Judge)

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